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15-cv-1705 (NSR)

OPINION & ORDER

BACKGROUND

Following Petitioner's convictions and the exhaustion of his state court appeals, he timely filed a Petition for a writ of habeas corpus on February 22, 2015. (ECF No. 2.) Through his Petition, Petitioner alleged that he was deprived of his due process rights to effective assistance

of counsel and that the government did not present legally sufficient evidence to convict him of two counts of criminal possession of stolen property in the fourth degree. He also alleged that he was deprived of a fair trial due to prosecutorial misconduct and that his sentencing was improper. Respondent filed on opposition to the Petition on June 15, 2015, (ECF No. 12), and Petitioner did not submit a reply.

On February 8, 2019, Judge McCarthy issued a R&R pursuant to 28 U.S.C. § 636(b) and Federal Rule of Civil Procedure 72(b), recommending that the petition be denied. (ECF No. 18.) Petitioner's objections were due by February 22, 2019, but none were filed.

STANDARDS OF REVIEW

A magistrate judge may “hear a pretrial matter [that is] dispositive of a claim or defense” if so designated by a district court. Fed. R. Civ. P. 72(b)(1); *accord* 28 U.S.C. § 636(b)(1)(B). In such a case, the magistrate judge “must enter a recommended disposition, including, if appropriate, proposed findings of fact.” Fed. R. Civ. P. 72(b)(1); *accord* 28 U.S.C. § 636(b)(1). Where a magistrate judge issues a report and recommendation,

[w]ithin fourteen days after being served with a copy, any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court. A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge.

28 U.S.C. § 636(b); *accord* Fed. R. Civ. P. 72(b)(2), (3). However, “[t]o accept the report and recommendation of a magistrate, to which no timely objection has been made, a district court need only satisfy itself that there is no clear error on the face of the record.” *Wilds v. United Parcel Serv., Inc.*, 262 F. Supp. 2d 163, 169 (S.D.N.Y. 2003) (quoting *Nelson v. Smith*, 618 F.

Supp. 1186, 1189 (S.D.N.Y. 1985) (internal quotation marks omitted); *accord Feehan v. Feehan*, No. 09-CV-7016(DAB), 2011 WL 497776, at *1 (S.D.N.Y. Feb. 10, 2011); *see also* Fed. R. Civ. P. Rule 72 advisory committee note (1983 Addition, Subdivision (b)) (“When no timely objection is filed, the court need only satisfy itself that there is no clear error on the face of the record in order to accept the recommendation.”).

DISCUSSION

Here, the R&R was issued on February 9, 2019 and the deadline for filing objections was February 22, 2019. Because Petitioner failed to file any objections, the Court reviews Judge McCarthy’s R&R for clear error and finds none. As Judge McCarthy noted, Petitioner’s trial counsel’s decision to forego an opening statement, call witnesses, or engage in cross examination were strategic and fell short of the ineffective assistance of counsel standard outlined in *Strickland v. Washington*, 466 U.S. 668, 685 – 87 (1984). The Court also agrees that Petitioner’s legal insufficiency of the evidence, prosecutorial misconduct, and improper sentence claims are procedurally barred from federal review because a state court determined that the claims were unpreserved for appellate review, which is an independent and adequate state ground.

CONCLUSION

For these reasons, the Court adopts Judge McCarthy's R&R in its entirety. The Petition is therefore DENIED and, because reasonable jurists would not find it debatable that Petitioner has failed to demonstrate by a substantial showing that he was denied a constitutional right, no certificate of appealability will be issued. *See* 28 U.S.C. § 2253(c). The Clerk of the Court is respectfully directed to enter judgment for Respondent and close this case. The Clerk of the Court is further directed to mail a copy of this Opinion to Petitioner at his address on the docket and show proof of service on the docket.

Dated: April 2, 2019
White Plains, New York

SO ORDERED:



Nelson S. Román
United States District Judge